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No.

IN THE

Supreme Court of the United States

October Term, 1991

IGNAZIO ANTONINO MANNINO, EMANNUELE SALVATORE MANNINO and ENZO VARISCO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(6888—LC4-442)

Questions Presented for Review

1. Whether the Government's failure to contemporaneously minimize intercepted communications or to inform the Court during the wiretaps that minimization would have to wait precluded their admission into evidence?

2. Whether Stefano Zito's statements to Kane, which were clearly not in furtherance of the conspiracy, were erroneously admitted into evidence?

3. Whether the admission and misuse of testimony that various alleged co-conspirators had pleaded guilty deprived Petitioners of a fair trial and due process of law?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

United States of America, Appellee

Francesco Gambino, Appellant
in No. 89-2087

Ignazio Antonino Mannino, Appellant
in No. 89-2088

Emannuele Salvatore Mannino, Appellant
in No. 89-2089

Grace Pulitano Mannino, Appellant
in No. 89-2090

Enzo Varisco, Appellant
in No. 90-1034

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In The

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IGNAZIO ANTONINO MANNINO,
EMANNUELE SALVATORE MANNINO and,
ENZO VARISCO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATED COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court in certain pre-trial matters was published in ***United States v. Gambino***, 728 F.Supp. 1150 (E.D. Pa., 1989).

The opinions of the Trial Court concerning the issue of minimization appears in Appendix A1, ***et seq.***.

The opinion of the Court of Appeals Captioned as ***United States of America v. Gambino***, ___F.2d___ (3rd Cir. 1991), appears in Appendix B7, ***et seq.***.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1). The Third Circuit Court of Appeals affirmed Petitioners' convictions and sentences on March 4, 1991. (A7)

CONSTITUTION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION
AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons of the things to be seized.

STATEMENT OF THE CASE

Petitioners, Ignazio Antonino Mannino, Emannuele Salvatore Mannino and Enzo Varisco, were charged with conspiracy to import heroin, 21 U.S.C. Sec. 963; conspiracy to distribute heroin, 21 U.S.C. Sec. 846; conspiracy to distribute cocaine, 21 U.S.C. Sec. 846 and money laundering, 18 U.S.C. Sec. 1956(a)(1).

Petitioners were tried to a jury with co-defendants Francesco Gambino, Grace Pulitano Mannino (the wife of Ignazio Antonino Mannino) and Carlo Fodera, before the Honorable Louis C. Bechtle, U.S.D.C.J., from July 21, 1989 through September 7, 1989. Petitioner, Ignazio Antonino Mannino, was convicted of conspiracy to import heroin in violation of Title 21 U.S.C. Sec. 963 and conspiracy to distribute heroin of 21 U.S.C. Sec. 841(a)(1). Petitioner Enzo Varisco was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. Sec. 846. Petitioner Emannuele Salvatore Mannino was convicted of conspiring to import heroin, in violation of 21 U.S.C. Sec.

963 and conspiring to distribute heroin in violation of 21 U.S.C. Sec. 846. He was also convicted of money laundering, in violation of 18 U.S.C. 1956 (a)(1).

Ignazio Antonino Mannino was sentenced to a total of twenty seven years imprisonment, five years supervised release and fined $25,000.00. Emannuele Salvatore Mannino received a total of eighteen years imprisonment, five years supervised release and fined $25,000.00. Petitioner Varisco was sentenced to fifteen years imprisonment, five years supervised release and fined $10,000.00.

On March 4, 1991, the Court of Appeals affirmed each of the convictions. The Petitioners are currently incarcerated pursuant to the Judgment of Conviction.

Each of the Petitioners participated in telephone conversations which were intercepted by the government. The government introduced telephone calls made to the home of Ignazio Antonino Mannino. The wiretapped conversations of Petitioners were in the Sicilian dialect of the Italian language. The Mannino wiretap was extended several

times and lasted about six months. Most, if not all, of the intercepted conversations were minimized after the fact. No judge was ever advised during the course of the interceptions in any of the court ordered seven day reports that there was any problem concerning contemporaneous minimization using Sicilian-fluent translators.

A hearing was conducted to determine if the statutory requirement of minimization had been violated. The FBI case agent testified that the investigation was code named Iron Tower. It targeted narcotics trafficking by alleged members and associates of the Sicilian Mafia. The case was initiated in March of 1986. Despite the fact that it was anticipated that many conversations would be in the Sicilian dialect only one translator was employed. No attempt was made to hire additional translators until a point had been reached where additional resources would be needed. Therefore, the government conceded that most, if not all, conversations were minimized after the fact.

The agent was responsible for preparing seven day reports submitted to the Court in conjunction with electronic

interception. He admitted that he did not advise the Court with regard to the interceptions that no simul- taneous minimization was occurring. Ultimately it was stipulated by the government that no Judge was advised in any seven day report of any problem with regard to Sicilian translators. At the trial, two informants testified for the government. Timothy Zepp, who had been arrested for selling cocaine to an undercover agent, testified that he purchased cocaine from Petitioner Varisco either at Varisco's home or his pizzeria. In addition, Lillian Sotomayor, an admitted drug user who had been given immunity from prosecution and money by the government, testified that she assisted her boyfriend, Pietro Candela, sell cocaine to Varisco. In addition, William Kane, a convicted felon, testified that he began working in an undercover capacity for the government in October, 1986. Kane testified that he knew Ignazio Antonino Mannino and had been introduced to him by Simone Zito. Kane developed an especially close relationship with the brother of Simone Zito, Stefano. Although defense counsel below objected to any statements made by Stefano Zito to William

Kane as inadmissible hearsay, the Court below permitted Kane to testify that Stefano Zito had advised Kane that Torretta, Sicily, the hometown of Zito, was a town which produced heroin. Stefano Zito told Kane that women with large bosoms were selected as couriers to carry heroin during the winters. Stefano Zito described to Kane specifically how the heroin smuggling operation supposedly operated. Kane was also permitted to testify that Stefano Zito advised him that Simone Zito, along with Petitioner Emannuele Salvatore Mannino, accompanied Simone Zito's wife on a trip to Sicily to exchange cocaine for heroin.

Kane was also permitted to testify over objection that Stefano Zito had advised him that Simone Zito and Petitioner Ignazio Antonino Mannino were getting into the cocaine business. Kane further testified about a heroin transaction between himself and Simone Zito. This transaction occurred on October 21, 1987.

Another cooperating witness for the government was Robert Reyers, an individual who is a defendant in the case and who, during the course of the trial, changed his plea to

one of guilty. Reyers testified that he knew Bill Kane as a customer and was acquainted with Simone Zito. He further testified that Stefano Zito told him that Simone Zito and Ignazio Antonino Mannino were importing heroin into this country. Reyers also testified that Petitioner Ignazio Antonino Mannino attempted to ascertain whether Reyers could find out from his wife, a stenographer in the federal courts, if certain names were mentioned in the Grand Jury. Reyers testified that he obtained such information from his wife and gave it to William Kane and Simone Zito. Reyers testified further that Simone Zito had made a statement to Reyers that Petitioner Ignazio Antonino Mannino had gone to Florida to see if he could purchase cocaine from an individual named Sal Rina. Reyers further testified that Simone Zito referred to Petitioner Ignazio Antonino Mannino as "his partner".

REASONS FOR GRANTING THE WRIT

POINT I

Wiretapped conversations not contemporaneously minimized without good cause must be suppressed in their entirety.

From its inception, this investigation targeted Sicilian-speaking and bi-lingual alleged members and associates of the Sicilian Mafia. Therefore, it was reasonably foreseeable that many conversations would be spoken in Sicilian. In ***United States v. Adamita***, 88 Cr. 217, S.D.N.Y., the Honorable John Sprizzo, presented with similar facts, ordered the suppression of a number of tapes because of a failure to minimize. Yet, applying the same statute to virtually identical facts, the Court in the instant case failed to suppress!

It has been stated that the requirements of the Fourth Amendment cannot be forgiven in the name of law enforcement. ***Berger v. New York***, 388 U.S. 41, 62 (1967). Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Although

Title III of the Omnibus Criminal Control and Safe Street Act of 1968 (18 U.S.C. Sec. 2510 *et. seq.*) authorizes a Court to order the interception of wire and oral communications, responsible officials, including judicial officers, must take care to insure that searches are conducted in a manner that minimizes unwanted intrusions upon privacy. ***Andresen v. Maryland***, 427 U.S. 463, 482 n. 11 (1976).

Title III as amended by the passage of Pub. L. 99-508. Section 106(c) added provisions relating to minimization where the intercepted communication is in code or foreign language. Specifically, the Amendment provides that where an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. 18 U.S.C. Sec. 2518(5).

The Third Circuit had stated in previous cases that the minimization requirement is satisfied if, on the whole, the government has shown a high regard for the right of privacy by doing all that they reasonably could to avoid unnecessary intrusion. ***United States v. Armocida***, 515

F.2d 29, 42 (3rd Cir. 1975).

In the instant case, the government exhibited no regard for the privacy rights of Petitioners as evidenced by the lack of candor the government displayed to the supervising court. It was stipulated, at the close of the suppression hearing, that the Trial Court had never been advised of the lack of minimization occurring in this case. The agent who was responsible for drafting the seven day reports submitted to the Court during the course of the execution of the interception orders, never took the time or the trouble to advise the Court that translators could not be contacted or hired to assist in the minimization process. Instead, the agent assumed that his conferences with attorneys in the United States Attorney's Office were sufficient to demonstrate compliance with minimization requirements. Obviously, they were not since the United States Attorney never informed the Court either of the lack of contemporaneous minimization.

The government took few, if any, steps to ascertain the availability and eligibility of interpreters in the Sicilian

language. Although several agents testified during the course of the trial that they had expertise in Sicilian, these agents were never contacted by the case agent to ascertain their availability to assist in the monitoring of the numerous wiretaps and bugs which had been placed by the government. Petitioners argue that such lack of effort hardly constitutes substantial compliance with the minimization requirements of Title III.

Indeed, the government's conduct in failing to contemporaneously minimize, ignored the mandate of Title III's requirements and violated the Fourth Amendment prohibition against general searches. The record below established that a high percentage of the calls which were intercepted were unrelated to, and beyond the scope of, the wiretap warrant. Literally thousands of conversations were intercepted and only about 400 of them were offered into evidence by the prosecution. No rationale justified the repeated, intentional, trespassory intrusions into the Petitioners' constitutionally protected area of privacy. For example, the conversations of children were regularly

intercepted during the course of the implementation of these orders, and non-pertinent conversations were frequently referred to in order to assist in identification. By committing numerous unjustified intrusions into the sanctity of the Petitioners' privacy, the government ignored the specific and unique directives of the warrants authorizing electronic surveillance. ***Berger v. State of New York***, supra, ***United States v. Heldt***, 688 F.2d 1238, 1253 (D.C. Cir. 1981). The conduct of the government herein was more than mere isolated instances of excessive monitoring which would clearly not require suppression. Rather, the continuous and pervasive acts of over monitoring and non-minimization were a clear violation of the law. Compare, ***Scott v. United States***, 436 U.S. 128 (1978) where this Court found execution of the interception orders to have been reasonable under the circumstances. See also, ***United States v. Armocida***, *supra*, 515 F.2d 29, 43.

In ***Armocida***, the Court noted several factors which were relevant to a determination of whether there had been substantial compliance with the statute. Specifically, the

Court pointed to the nature and scope of the criminal enterprise under investigation, the government's reasonable expectation as to the character of, and the parties to, the conversation and degree of supervision by the authorizing judge. ***United States v. Armocida***, *supra*, 515 F.2d at 44.

In Petitioners' case, the government was very well aware of the nature and scope of the criminal enterprise under investigation at the time it made its application for the warrants which were issued in this case. As evidenced by the early applications in this case, the government was relying upon information which it had gathered in prior cases to describe the nature and scope of the alleged instant conspiracy. Thus, the government was able to describe this case as a widespread narcotics conspiracy involving, in part, persons of Sicilian extraction as well as others. the government was able to identify many targets of the investigation at the point it applied for these warrants. The government knew at the time that it made its application that many of the individuals in this case would speak the Sicilian

dialect. Thus, unlike ***Scott v. United States***, *supra*, the nature and scope of the criminal enterprise was already ascertained by the government. And, the government not only had a reasonable expectation as to the character of and the parties to the conversations, but to a great extent knew the character of those conversations. Finally, it is conceded by the government that, with regard to the minimization requirement, there was utterly no supervision by the Court below.

Petitioners submit that the government failed to meets its burden of proving its conduct avoided unnecessary intrusions and that its conduct resulted in no greater invasion of privacy than was necessary under the circumstances. ***United States v. Armocida***, *supra*, 515 F.2d at 43. The government's flagrant and willful disregard of the Fourth Amendment rights of Petitioners demanded suppression of all evidence seized as a result of the execution of the wiretapped orders, and any evidence derivatively obtained.

Although this Court in ***Scott v. United States***, *supra*, 436 U.S. 128, specifically declined to define the

scope of suppression for failing to minimize, many Courts have agreed that total suppression of all intercepted conversations is mandated when the violation of statutory requirements of minimization is flagrant. See, ***United States v. Santora***, 600 F.2d 1317, 1320 (9th Cir.), *modified*, 609 F.2d 433 (9th Cir. 1979); ***United States v. Hyde***, 574 F.2d 856, 869 5th Cir., *reh.* and *reh. en banc den.*, (5th Cir. 1978); ***United States v. Turner***, 528 F.2d 143, 156 (9th Cir.), *cert. den. sub. nom.*, ***Grimes v. United States***, 423 U.S. 996 (1975), and *sub. nom.*, ***Hackett v. United States***, 429 U.S. 837 (1976); ***United States v. Suquet***, 547 F.Supp. 1034 1039 (N.D. Ill. 1982); ***United State v. Webster***, 473 F.Supp. 586, 598 (D. Md. 1979) *aff'd. in part, rev'd in part on other grounds*, 639 F.2d 185 (4th Cir. 1982), *cert. den.* 456 U.S 935 (1982); ***United States v. Curreri***, 363 F.Supp. 430, 437 (D. Md. 1973); ***United States v. Lanza***, 349 F.Supp. 929, 932 (M.D. Fla. 1972); ***United States v. Leta***, 332 F.Supp. 1357, 1360 n. for (M.D. Pa. 1971). Some Courts have gone further and required the total

suppression of all communications whenever the minimization requirement is violated. ***United States v. Focarile***, 340 F.Supp. 1033, 1047 (D. Md.), *aff'd. sub. nom.*, ***United States v. Giordano***, 469 F.2d 522 (4th Cir. 1977), *aff'd. on other grounds*, 416 U.S. 505; ***United States v. Scott***, 331 F.Supp. 233, 248 (D.C. Cir. 1971), *vacated on other grounds*, 504 F.2d 194 (D.C. Cir. 1974); ***People v. Brenes***. 42 N.Y.2d 41, 49-50, 396 N.Y.S.2d 629 (1977); ***State v. Cantania***, 85 N.J. 418, 426, 427 A.D. 537 (1981).

The reasons requiring total suppression in this case are manifest. First, it is the need for an effective detriment to the unlawful conduct of wire taps. Congress recognized the need to articulate the prohibition of the use of an oral communication intercepted in violation of Title 3. See, U.S.C. Sec. 2515. Second, when Courts fail to suppress, they ignore the exceptional dangers inherent in electronic surveillance. ***Berger v. New York***, *supra*. Third is the traditional reluctance of any court to accept as evidence material seized in direct disregard of the statute. Fourth,

were Courts to suppress selectively on an item by item basis, it would make minimization requirements under the statute illusory. As stated in ***United States v. Focarile***, *supra.*:

> "In this Court's opinion the minimization requirement of Section 2518(5) would be illusory if it were enforced on an item by item basis by means of suppressing unauthorized seizures at trial after interception is a fait accompli. Minimization as required by the statute must be employed by the law enforcement officers during the wire tap...Knowing the only "innocent" calls would be suppressed, the Government could intercept every conversation during the entire period of a wire tap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once

> seized can never truly be given back as could a physical object. The right of privacy protected by the Fourth Amendment has been more invaded when a conversation which can never be returned has been seized then where a physical object which can be returned has been seized."

See, ***United States v. Scott***, 331 F.Supp. 233, 246-249 (B.D.C. 1971); ***United States v. Leta***, 332 F.Supp. 1357, 1360 note for (M.D. Pa. 1971).

Fifth, the purpose of the minimization requirement is to prevent a wire tap from turning into a "general search and wholesale invasion of privacy." ***United States v. King***, 335 F.Supp. 523, 544-545 (S.D. Cal. 1971), *aff'd. in part, rev'd. in part on other grounds*, 478 F.2d 494 (9th Cir.), *cert. den. sub. nom.*, ***Light v. United States***, 414 U.S. 846 (1973). The overhearing of telephone conversations by interception, like a search of documents, poses an inherent danger of turning into a general search, due to the difficulty of ascertaining the relevance of the item to be "seized".

Where disregard of a warrant's limitations is flagrant and entire, the otherwise valid warrant may become a general one, in which case the fruits of the search must be suppressed. ***United States v. Heldt***, 669 F.2d 1238, 1259 (D.C. Cir. 1981); See, ***United States v. Sequet***, 547 F.Supp. 1034, 1039-1043 (N.D. Ill. 1982); ***United States v. Adamita***, 88 Cr. 217 (S.D.N.Y. 1989).

Failure to minimize in the instant case violated Petitioners' Fourth Amendment rights. The decision below by the Third Circuit ignored its own precedent as well as that of other circuits. As such, its departure calls for an exercise of this Court's power of supervision. Moreover, the refusal of the Third Circuit to reverse the District Court on minimization is in conflict with this Court's decision in ***Scott v. United States***, *supra.*, 436 U.S. 128.

As Justice Jackson once wrote "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers " ***Krulewitch v. United States***, 336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949) (Jackson, J., concurring). This is

especially true where the conviction is for a narcotics violation at a time when the country is engaged in a "war on drugs." However, a courtroom is not the proper place in which to fight such a "war".

United States v. Eduardo Franco, 885 F.2d 1003, 1011 (3rd Cir. 1989).

POINT II

STEFANO ZITO'S STATEMENTS TO KANE WERE CLEARLY NOT IN FURTHANCE OF THE CONSPIRACY AND SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

The core of the Government's case against petitioners was the testimony of William Kane. Kane was a convicted felon who, in 1982, met an individual named Joe Gambino. In 1983, Kane and Joe Gambino became partners in a vending machine operation which gathered both individuals substantial amounts of money. Kane testified that he saw Mr. Gambino regularly at a coffee house known as Cafe Mlliano which subsequently changed its name to the Cafe Giardino. The neighborhood in which Cafe Giardino is located was described by Kane as a Scillian area which had many cafes similar to the Cafe Giardino.

Kane stated, In October of 1986, he met with FBI agent Stalarski. He agreed to talk to Stalarski about various individuals who frequented this area of Brooklyn. Kane testified that he knew Co-defendant Franceso Gambino from the Cafe as well as Simone Zito. Kane testified further that

he knew petitioner Ignazio Antonino Mannino and had been introduced to him by Simone Zito. Kane developed an especially close relationship with the brother of Simone Zito, Stefano. Although defense counsel below objected to any statements made by Stefano Zito to William Kane as inadmissable hearsay, the trial court permitted Kane to testify that Stefano Zito had advised Kane that Torreta, Sicily, the home of Zito, was a town which produced heroin. Kane testified further that Stefano Zito told Kane that women with large bosoms were selected as couriers to carry heroin during the winters. Stefano Zito described specifically how the heroin smuggling operation supposedly operated. Kane was also permitted to testify that Stefano Zito advised Kane that Simone Zito along with petitioner Emannuele Salvatore Mannino, the brother of petitioner Ignazio Antonino Mannino, accompanied Simone Zito's wife on a trip to Sicily to exchange cocaine for heroin.

Kane was permitted to testify further that Stefano Zito had advised him that Simone Zito and petitioner Ignazio Antonino Mannino were getting into the cocaine business.

Stefano also told Kane about a trip to Florida taken by Stefano. In addition, Stefano told Kane how he brought heroin into the United States in a gift box. The trip to Florida was a reward to Stefano for his successful heroin importation.

Over objection, Kane was permitted to testify that Stefano Zito had told Kane that Stefano Zito as well as Simone Zito and petitioner Ignazio Antonino Mannino were members of the mafia in Torretta, Sciliy. Kane testified further, over objection, that Stefano Zito also told Kane that Simone Zito and petitioner Ignazio Antonino Mannino had a cocaine network.

Counsel below vigorously objected and moved for a mistrial when the prosecution sought to elicit the contents of Stefano Zito's alleged statements to Kane, on the ground that Zito was not a co-conspirator and, even if he was, the statements were mere narrative and not in furtherance of the conspiracy. Although the trial court initially sustained counsel objections, the court subsequently admitted the testimony "subject to being tied up."

After the government rested, counsel again requested that the trial court make finding pursuant to ***Bourjaily v. United States***, 483 US 171 (1987), but the court stated that it would make these finding at the close of all "all" evidence. The court later ruled that various persons were co-conspirators including Stefano Zito as a co-conspirator in the heroin importation and distribution conspiracies, but did not include him as a co-conspirator in connection with the cocaine distribution.

Petitioners contend that the lower court erred, as a matter of law, in admitting Stefano's alleged co-conspirator hearsay. In the first place, Stefano Zito's alleged statements were highly suspect. Stefano may well have picked up bits and pieces of information from Simone Zito, his older brother, and because Stefano had, according to the testimony, "nothing to do", he embellished and enlarged upon them to make himself important in the eyes of friends such as Kane and Reyers. Stefano's assertion, ridiculous on its face, that "all three thousand people" living in Torretto, Sicily were involved in heroin manufacturing and smuggling

is precisely the kind of "grandiose puffing" that stamps both that assertion and the rest of his alleged statements as pure invention. When the "presumed" unreliability of co-conspirator heresay is recalled, Stefano's statements are entitled to no credence at all. See ***United States v. Silverman***, 861 F2d 571, 578 (9th Circuit 1988).

The requirements of Federal Rule of evidence 801(d)(2)(E) should not be read so broadly that anything said relating to a conspiracy is found to be in furthance of its objectives. Developments in the law, "Criminal Conspiracy" 72 Harv.L.Rev. 920, 985 (1959) As stated by a leading commentator, this is a result that the advisory committee on the rule sought to avoid by retaining the "in furtherance of" requirements. Weinstein's evidence, pages 801-236, 801-237 (Matthew Bender 1984).

Mere idle conversation or narrative are ordinarily not statements made in furtherance of the conspiracy and should not be admitted into evidence. See ***United States v. Phillips***, 664 F2nd 971, 1027 (5th Circuit 1981), cert. denied, 457 US 1136 (1982). In ***United States v.***

Provenzano, 620 F2nd 985, 1001 (Third Circuit), cert. denied, 449 US 899 (1980), the Third Circuit found that statements similar in nature to Stefano Zito's statements about his role in the conspiracy were not in furtherance of the conspiracy. In the case at bar, Stefano Zito's statements, purportedly to William Kane, were mere narratives of past events and did not further any goal of the conspiracy. Zito's statement to the witness concerning the town of Sicily and the alleged criminal activities of petitioner Antonino Mannino were not made to further any objective of the alleged conspiracy and were clearly not made for purposes of a cover-up. The "in furtherance of" requirement is a prerequisite to the admissability of statements offered as evidence under federal rule of evidence 801 (d)(2)(e). Cf., ***Krulewitch v. United States***, 336 US 440, 443-444 (1949).

This honorable court should grant review of the question presented so as to clarify the meaning of the "In furtherance of" requirement and set appropriate standards for the courts below to follow. It is respectfully submitted that,

upon a review of that requirement, reversal of the judgement below will follow.

POINT III

The admission and misuse of testimony that various alleged co-conspriators had pleaded guilty deprived petitioners of a fair trial and due process of law.

The admission of testimony by Robert Rarez, a co-defendant in the trial, that he had pleaded guilty and the use of that testimony in the prosecutor's summation deprived petitioners of a fair trial and due process of law.

A significant Constitutional question arises from the testimony of co-defendant Robert Reyers in the trial of this case. Reyers was indicted along with petitioners and late into the trial withdrew his previously entered plea of not guilty and entered a plea of guilty. In return for his plea, and for leniency, Reyers testified as prosecution witness against his co-defendants in this case.

Reyers testimony was that he knew William Kane, the key witness in this case, as a customer in his car dealership and was acquainted with Simone Zito. Reyers testified that Stefano Zito told him that Simone Zito and petitioner Ignazio Antonino Mannino were importing heroin

into this country. Reyers claimed that petitioner Ignazio Antonio Mannino attempted to ascertain whether Reyers could find out from his wife, a stenographer in the Federal courts, if certain names were mentioned in the Grand Jury. Reyers testified that he obtained such information from his wife and gave it to cooperating witness William Kane and Simone Zito. Reyers further testified that Simone Zito had made a statement to Reyers that petitioner Ignazio Antonio Mannino had gone to Florida to see if he could purchase cocaine from an individual named Sal Rina. Reyers also stated that Simone Zito referred to petitioner Ignazio Antonio Mannino as "his partner". Reyers testimony was over defense objection. Reyers testimony also included that he had pleaded guilty and that Kane had informed Reyers of many of the incidents about which Kane had testified, including the only two alleged purchases of drugs in the case, from Simone Zito and petitioner Ignazio Antonino Mannino on October 21 and 22, 1987.

The prosecutors use of Reyers testimony in summation seriously undermined the petitioners right to a

fair trial. The prosecutor stated:

> "I'm sure you remember Mr. Reyers. He started out as a defendant in this case, and ultimately ended up testifying as a witness...do you think that Robert Reyers and William Kane and...were all lying, members of the jury? Or do think they all told essentially the same thing about the heroin importation and Antonino Mannino's role and Simone Zito's role because that's in fact, what took place?"

The prosecutor continued,

> [Defense Counsel] in talking about William Kane, told you what a liar he was...but remember this; Reyers and Joseph Cuffaro thought he was such a liar that, based on his evidence against them, they pled guilty. And you heard Mr. Reyers, that he pled guilty. And you heard during the course of this trial that the evidence against Mr. Reyers came

primarily from William Kane.

Counsel for petitioners Varisco and Antonino Mannino objected, but the District Court overruled the objection. Counsel for Antonino Mannino later moved for a mistrial which the District Court denied, on the ground that the guilty pleas could not be used as evidence of Kane is veracity.

Petitioners contend that Reyers testimony, the prosecutor's summation, and the inadequate instructions of the Trial Court present significant questions of Law which should be reviewed by this Honorable Court. Competing values exist in this case and the court should render a decision on balancing the various values and on the appropriate standards to be applied in a determination. Specifically, this Court should review initially the propriety of permitting a co-defendant, who has sat the defense table for a substantial portion of the trial, being permitted to both enter a plea of guilty and testify in the same case against his co-defendants. Significantly, Reyers testimony could only have bolstered the testimony of William Kane in this case.

In ***United States v. Toner***, 173 F2nd 140 (3rd Circuit 1949), the court stated

> The foundation of the...policy [prohibiting evidence of a co-conspirators guilty plea] is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else [Conviction] of an alleged fellow conspirator after trial [or guilty plea] is not admissible as against one now being charged.

See also, ***United States v. Miranda***, 593 F2nd 590, 594-96 (5th Circuit. 1979). The petitioners submit that the appropriate remedy here was to grant counsel's motion for a mistrial to prevent the jury from misusing Reyer's disappearance and the implication that he had pleaded guilty. In the absence of such a declaration, the jury was freed to infer petitioners guilt on the basis of Reyer's change of heart. This denied petitioners their right to due process of law. Research has not disclosed a single case decided in the United States Supreme Court in which the court approved of

the procedure whereby a co-defendant who plead guilty during trial has been permitted to testify as a prosecution witness at the same trial. Allowing the co-defendant to proceed in such a manner raises the specter that such a witness has revealed or will reveal defense secrets to the prosecution as part of any deal made with the government. Although defense counsel in this case weren't able to substantiate their belief that this had in fact occurred, clearly there was a diversion of the attention of all the parties on to this collateral matter. Petitioners believe that a "bright line" rule should be formulated by this honorable court prohibiting defendants who plead during a trial from becoming a witness for the prosecution at the same trial. This issue should be fully briefed and reviewed by the court.

Moreover, petitioners submit that the court's limiting instruction in this case was of no value to petitioners. This Honorable court has declared, in the past, that there are certain situations in which the legal fiction of a jury's obligation to follow instructions will simply be disregarded because the danger of prejudice simply over whelms the

notion that a jury will disregard substantially prejudicial matter. See ***Richardson v. Marsch***, 481, US 200 (1987).

Indeed, in the case of at bar, the lack of instruction when combined with the prosecutors use of Reyer's change of heart during a summation arise substantial questions as to the fairness of the procedures employed against the petitioners. For all of the foregoing reasons, this petition should be granted and this issue review.

CONCLUSION

This court should grant a petition for Certiorari because: first, the court should review the existing law on minimization and render a determination on whether minimization has any remaining Constitutional significance, should determine the significance of the "In furthance of the conspiracy" and its application in admitting evidence of statements made by co-conspirators, and should settle the law in the area determining the use of a co-conspirators testimony during a trial in which he is a defendant and during which he enters a plea of guilty.

Respectfully submitted,

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Appendix A—Opinion of the United States Court of Appeals for the Third Circuit, Filed March 4, 1991.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-2087, 89-2088, 89-2089,
89-2090 and 90-1034

UNITED STATES OF AMERICA

v.

FRANCESCO GAMBINO,
Appellant in No. 89-2087

IGNAZIO ANTONINO MANNINO,
Appellant in No. 89-2088

EMANUELE SALVATORE MANNINO,
Appellant in No. 89-2089

GRACE PULITANO MANNINO,
Appellant in No. 89-2090

ENZO VARISCO,
Appellant in No. 90-1034

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 89-00003-01, 89-00003-02,
89-00003-04, 89-00003-12 & 89-00003-08)

Argued September 17, 1990

Before: SCIRICA, ALDISERT and
HIGGINBOTHAM*, *Circuit Judges*

(Filed March 4, 1991)

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* Since the date of argument Judge Higginbotham has assumed senior status.

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

Defendants appeal their jury convictions of conspiracy to import and distribute heroin (21 U.S.C. §§ 963, 846) and money laundering (18 U.S.C. § 1956(a)(1)). We will affirm.

I.

Francesco Gambino supervised the importation and distribution of heroin from Italy to the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by Antonio ("Tony") Mannino and Simone Zito, with assistance from Tony Mannino's brother Salvatore ("Sal") Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Enzo Varisco was one of the conspiracy's cocaine distributors.[1]

Before addressing defendants' contentions, it is necessary to recite the facts in some detail and in particular the background and role of William

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1. Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin (21 U.S.C. §§ 963, 846), Sal and Grace Mannino were convicted of money laundering (18 U.S.C. § 1956(a)(1)), and Enzo Varisco was convicted of conspiring to distribute cocaine (21 U.S.C. § 846).

Kane, an FBI informant and the government's most significant witness. Kane ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino, and operated out of the Cafe Giardino in Brooklyn, owned by Joe Gambino. Through his illegal business, Kane became involved with the defendants in this case.

In October 1986, however, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was then in Sicily, arranging for an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time.

Working with the FBI, Kane began to participate in the conspirators' illegal activities. Because neither Simone nor Stefano Zito had any legitimate source of income, Kane carried them on the payroll of his video game company and arranged financing for their automobiles. Kane soon moved on to more direct involvement in the conspiracy.

In October, 1987, Simone Zito told Kane that he wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned

that he did not want anyone to know about the transaction, not even Tony Mannino. Zito responded that "me and Tony's the same person."

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito the $25,000. Tony Mannino accompanied Zito to that meeting, and afterwards Kane, Mannino and Zito discussed further heroin sales. In the course of these discussions, Kane mentioned that his boss in the drug trade was Joe Gambino. Mannino responded that his and Simone Zito's boss in the drug trade was Francesco Gambino.

On several other occasions, Simone Zito and Kane discussed further heroin transactions both in recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardino which significantly corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Zito offered to sell Kane a kilogram of heroin on the spot. Kane, who was not able to purchase drugs without FBI authorization but did not want to seem disinterested, countered with a much lower offer. At that point, Simone Zito walked to the rear of the cafe, out of Kane's sight, then returned with the information that the price was negotiable, and that Kane could take a sample home to New Jersey. Shortly afterward, Kane determined that the only two people in the cafe, other than himself and Simone Zito, were Francesco Gambino and a bartender.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with defendants pled guilty and testified for the government. Salvatore Allegra testified that in 1985, he was asked by Tommaso Scalici to hire

couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers who travelled to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986.

Tony Mannino and Simone Zito also sought Kane's assistance in their cocaine distribution scheme. Salvatore Rina, a friend of Kane's who lived in Florida, had access to large amounts of cocaine. Mannino and Zito wanted Kane's help in obtaining cocaine from Rina.[2]

Timothy Zepp, another FBI informant, also testified about the conspiracy's involvement in the cocaine trade. According to Zepp, Zito sold cocaine to Enzo Varisco. Zepp was one of Varisco's customers. On one occasion, Zepp arrived at Varisco's pizzeria to pick up a cocaine delivery. Because the cocaine had not yet arrived, Varisco told Zepp to wait. Soon Simone Zito arrived, carrying a bag. After Simone and Varisco went briefly to a back room, Varisco handed Zepp his cocaine. In a later conversation with Zepp, Simone Zito revealed that he knew the price Varisco charged for the cocaine, and offered Zepp a better price.

Grace Mannino, Tony Mannino's wife, was also involved. Because Tony Mannino knew that his telephone was being tapped, the conspirators devised an elaborate system of arranging for calls to and from various public pay telephones to conduct their drug trade. Typically a conspirator

2. The record does not reveal whether this contemplated transaction ever took place.

would call Grace Mannino and arrange for a telephone call to the "attorney's office" at a particular time. At the specified time, Simone Zito or Tony Mannino would be observed by government agents picking up a pay telephone.

Many of the telephone calls by conspirators to the Mannino residence were in halting, guarded code. For example, on January 5, 1988, Grace Mannino told Giovanni Angelo Mannino, Tony Mannino's brother, to call her husband Tony "at the same place as two days ago." Later that day, Simone Zito called the Mannino residence and told Sal Mannino to "call your brother . . . not at that place where you went two days ago . . . the one before . . . be careful at what you are doing." Calls that were not so cryptic explained when Tony Mannino would arrive in Brooklyn for his frequent meetings with Francesco Gambino.

The conspirators laundered their proceeds. In 1987, Tony Mannino, Sal Mannino, Grace Mannino, and Simone Zito purchased a house to shelter their drug profits. As we have noted, in October, 1987, Simone Zito told Kane that he needed money to buy a townhouse both as an investment and as a place to cut heroin. The day after Kane delivered the $25,000 to Simone Zito and Tony Mannino, $16,000 in cash was deposited in the bank account of SNT corporation, the corporate name of a pizzeria owned and operated by the Manninos. Like the money that Kane handed Simone, the deposit contained a large number of one hundred dollar bills. The government presented evidence at trial suggesting that the remaining $9,000 was paid into the account over the next several weeks.

Two other incidents corroborate Francesco Gambino's role in the conspiracy. As we have

noted, Kane helped Stefano and Simone Zito obtain automobiles. Kane made these arrangements through Robert Reyers, who was an automobile dealer in southern New Jersey. Through these transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January, 1988, Robert Reyers told Kane, Simone Zito and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that came before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up in connection with the grand jury. Those names were Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa was told by his supplier, Sal DiMaggio, that DiMaggio's supplier needed as much money as possible to send to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant and DiMaggio went to an apartment upstairs. While waiting, Ricupa could see Gambino from his vantage point in the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with

Gambino, DiMaggio placed the bags in the car, and Gambino drove away.

On July 26, 1988, the FBI searched an apartment in Brooklyn, New York that was rented in the name of Salvatore Inzerillo. Prior to this search, Inzerillo, Simone Zito, and Tony Mannino had been seen going to and from the apartment. The search turned up a sample quantity of heroin and approximately $12,000 in cash. Reyers testified that after the search, Simone Zito said that if the search had taken place a day later "they would have caught us with four kilos of heroin."

As we have noted, following trial, Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin, Sal and Grace Mannino were convicted of money laundering, and Enzo Varisco was convicted of conspiring to distribute cocaine. The townhouse was forfeited to the United States government pursuant to 21 U.S.C. § 853.[3]

All of the defendants appeal on various grounds. For the reasons discussed below, we will affirm the district court.

II. Co-conspirator Hearsay

Kane's recounting of Tony Mannino's assertion that he and Simone Zito worked for Francesco Gambino was one of the most compelling pieces of evidence offered against Gambino. Federal Rule of Evidence 801(d)(2)(E) exempts from the hearsay rule "a statement by a coconspirator of a party during the course of and in furtherance of the

3. Francesco Gambino was sentenced to thirty years' imprisonment, Tony Mannino, 27 years' imprisonment, Sal Mannino, 18 years' imprisonment, Enzo Varisco, 15 years' imprisonment, and Grace Mannino, one year and one day in prison.

conspiracy." In determining whether the co-conspirator exception applies in a particular case, the trial court must determine, by a preponderance of the evidence, that there was a conspiracy between the declarant and the party against whom the evidence is offered; and that the hearsay statements sought to be admitted were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Gambino contends that there was insufficient evidence of his participation in the conspiracy, and also that the hearsay statement should not have been admitted subject to later connection.

A.

Specifically, Gambino alleges that it was error for the district court to admit the hearsay statements prior to determining their admissibility. We begin with the observation that "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." *United States v. Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *see also United States v. Ammar*, 714 F.2d 238, 245-47 (3d Cir.) (upholding admission of co-conspirator statements subject to later connection), *cert. denied*, 464 U.S. 936 (1983); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820-21 (3d Cir. 1982) (holding that *Continental Group* permitted, but did not require, admission of co-conspirators' hearsay statements subject to later connection), *cert. denied*, 459 U.S. 1156 (1983). We review for abuse of discretion. *Ammar*, 714 F.2d at 247.[4]

4. We have not been able to find in the record a timely objection. Gambino did not object when the challenged statement was elicited from Kane at trial. On appeal, Gambino asserts that he objected to the statement in several pretrial

There is a danger that if hearsay statements of an alleged co-conspirator are admitted subject to later connection, the court may determine at the close of evidence that the offering party did not meet its burden of establishing a conspiracy and the jury would be irremediably prejudiced. Therefore we have counseled that the practice of admitting co-conspirator hearsay statements subject to later connection "be carefully considered and sparingly utilized by the district courts." *Continental Group*, 603 F.2d at 457.

At the same time, we have consistently recognized that "the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy." *Id.* at 456 (quoting *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 195 (3d Cir. 1970) (upholding the district court's decision to admit co-conspirator statements subject to later connection)). In *Continental Group*, we upheld the district court's decision to admit co-conspirator hearsay subject to later connection because "given the large amount of interrelated testimony to be considered in this case, we believe that alternative approaches may have been unduly complex and confusing to the jury or to the court." *Id.* at 457. Similar difficulties confront the trial judge in many large-scale conspiracy cases.

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motions, and provides three citations to the record. We have examined his citations, but none of the cited materials raise this objection. Gambino also asserts that the defendants repeatedly requested findings on the admissibility of co-conspirator statements during trial, but offers no record citations. Therefore we could review this, and the other challenges to the admission of Kane's statement that he worked for Gambino, under a plain error standard.

This case is no exception. The government's proof consisted of a large amount of interrelated testimony. Except for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses. For these reasons, we find that the district court's decision to admit the testimony subject to later connection was not an abuse of discretion.

B.

Gambino also contends that timing aside, the government did not adequately establish his connection to the conspiracy. As we have noted, the trial court must determine, by a preponderance of the evidence, whether the defendant and the declarant were members of the alleged conspiracy, and whether the hearsay statements were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily*, 483 U.S. at 175-76 (1987). Before the adoption of Fed. R. Evid. 104(a), proof of a conspiracy required evidence external to the hearsay statement itself. This rule was premised on the belief that a statement should not be able to "lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60, 75 (1942). *Bourjaily* made clear, however, that the adoption of Fed. R. Evid. 104(a) changed the earlier rule, and that the co-conspirator's hearsay statement could be used to establish the existence of a conspiracy.

In *Bourjaily*, the Court expressly declined to decide whether a trial court could rely "solely upon [the declarant's] hearsay statements to determine

that a conspiracy had been established by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 181. Here there is sufficient evidence external to the hearsay statement itself, so we need not address that issue today.[5]

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5. We note that every United States court of appeals that has addressed this issue has required some independent evidence. The pre-*Bourjaily* requirement of proof *aliunde* was premised on the presumptive unreliability of co-conspirator hearsay. *See* 483 U.S. at 179; Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1387 (1972) (coconspirator statements may suffer from "exclusively self-serving motives and possibly faulty memories"); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1165-66 (1954) ("The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has.").

The Court did not alter that presumption, but held that the ways in which it could be rebutted had been expanded by the adoption of Fed. R. Evid. 104(a). "[A] piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*. . . . [T]rial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case." 483 U.S. at 180 (emphasis added). In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant's connection to the conspiracy. *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989) ("It is generally agreed that 'an otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility.'") (quoting *Bourjaily*, 483 U.S. at 184 (Stevens, J., concurring)); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988) ("[A] co-conspirator's out-of-court statement, standing alone, is insufficient to establish that the defendant had knowledge of and participated in a particular conspiracy."); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) ("[T]here must be some evidence, aside from the proffered statements, of the

The district court assumed a need for some external evidence, and found that Gambino was a member of the conspiracy, and that the hearsay statement to Kane was made during the course of and in furtherance of that conspiracy. We review the district court's determination under a clearly erroneous standard. *United States v. Cruz*, 910 F.2d 1072, 1081 n.11 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 709 (1991).

The following independent evidence indicates that Gambino was involved in the conspiracy to import and distribute narcotics. First, there is the March, 1988 discussion in the Cafe Giardino between Kane and Simone Zito. After some bickering about the price of heroin, Simone Zito left for another area of the cafe, and upon returning Zito told Kane that the price was negotiable, and that he could have a sample of the heroin. Shortly thereafter, Kane observed that Francesco Gambino and a bartender were the only other people in the cafe. It was a permissible inference that Zito went to Gambino for authority to negotiate price.

Francesco Gambino was also strongly implicated through the compromise of confidential grand jury proceedings. Simone Zito provided Reyers with a list of four names, and asked Kane to inform him if any of the names were mentioned in grand jury proceedings. Gambino's name was on that list, along with the names of Simone Zito, Tony Mannino, and fugitive codefendant Domenico

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existence of the conspiracy and the defendant's involvement."); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988) (observing that some independent evidence is necessary); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.) (assuming that some independent evidence is necessary), *cert. denied*, 488 U.S. 821 (1988).

Mannino. It was a permissible inference that these individuals were linked in the drug trade.

Filippo Ricupa's testimony also tied Gambino to the conspiracy. In the 1985 money drop described in Part I, Gambino was in a car in front of the restaurant, and received the bags that DiMaggio brought downstairs. Furthermore, electronic surveillance revealed regular telephone calls between Gambino and Tony and Grace Mannino, many of which involved when Tony Mannino would arrive in Brooklyn for his frequent meetings with Gambino. When viewed in light of the other evidence they corroborate Gambino's involvement.

Finally, a series of FBI surveillance photographs showed Gambino in the presence of many of the co-conspirators, in particular Tony Mannino and Simone Zito, during "key periods of the conspiracy." *United States v. Gambino*, 728 F. Supp. 1150, 1155 (E.D. Pa. 1989). Mere association "cannot alone support a conviction for conspiracy. *United States v. Torres*, 519 F.2d 723, 725-26 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975). On the other hand, the timing and circumstances of a meeting or series of meetings may be sufficiently suspicious to permit a reasonable inference of complicity in the criminal enterprise." *United States v. Ammar*, 714 F.2d 238, 250 (3d Cir. 1983). In *Ammar*, we held that evidence of repeated meetings with other members of the conspiracy coinciding with heroin importations appropriately could be considered in determining whether the co-conspirator exception to the hearsay rule was applicable. Here, also, consideration of the photographs was appropriate.

To this evidence we now add the hearsay statement sought to be admitted. According to Kane, Tony Mannino directly asserted to Kane that

Gambino was Mannino's and Zito's boss in the drug trade. The district court, which heard the testimony, concluded that all of this evidence, taken together, established by a preponderance of the evidence Tony Mannino and Simone Zito's membership in a conspiracy with Gambino. This determination was not clearly erroneous.

III.

All of the defendants challenge the admission and use of several witnesses' guilty pleas.

A.

At trial, the government presented several witnesses who were co-conspirators and who had pled guilty. While on the stand, the government elicited testimony about their guilty pleas. Defendants contend that these references to the co-conspirators' guilt were prejudicial and deprived them of a fair trial.

Defendants did not object during the witnesses' testimony. Therefore, we review this matter under a plain error standard. *See* Fed. R. Evid. 103(a)(1) (requiring a "timely objection . . . stating the specific ground of objection, if the specific ground was not apparent from the context"); *United States v. Pungitore*, 910 F.2d 1084, 1125-26 (3d Cir. 1990) (reviewing for plain error statements to which defendants did not object), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[6] Under the plain

6. Some of the testimony was objected to on other grounds. For example, defendants objected to the admission of Zepp's guilty plea on the ground that Zepp's discussion of the plea agreement included a reference to the protection the government was providing him. That did not preserve the objection that is currently before us. *See, e.g., United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve [an] issue on review.").

error standard (Fed. R. Crim. P. 52(b)), we can correct "only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.) (quoting *United States v. Young*, 470 U.S. 1 (1985)), *cert. denied*, 488 U.S. 928 (1988).

There are strong considerations against using a co-conspirator's guilt as substantive evidence of another defendant's guilt. "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). In *Bisaccia*, a *habeas corpus* proceeding, we held that a prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and remanded for a determination of whether the error was harmless.

This specter is not implicated when a guilty plea is introduced not to establish a co-conspirator's guilt, but for some valid purpose. For example, in *United States v. Inadi*, 790 F.2d 383, 384 n.2 (3d Cir. 1986), we upheld the admission of a co-conspirator's guilty plea "in order to rebut defense counsel's persistent attempts on cross-examination to raise an inference that the co-conspirators had not been prosecuted, and that Inadi was being singled out for prosecution."

In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate. *See United States v. Casto*, 889 F.2d 562, 567 (5th Cir. 1989) ("Because it was reasonable for the prosecution here to believe that [defendant's] counsel would attempt to impeach [a testifying co-conspirator's] implicating testimony by questioning her about her guilty plea, it was also reasonable for the prosecutor to adduce this fact during her opening examination of [the testifying co-conspirator]."), *cert. denied*, __ U.S. __, 110 S. Ct. 1164 (1990); *United States v. Dworken*, 855 F.2d 12, 30 (1st Cir. 1988) ("[T]he fact of [a] guilty plea and the plea agreement properly may be elicited to dampen the effect of an anticipated attack on the witness' credibility."); *United States v. Louis*, 814 F.2d 852, 856 (2d Cir. 1987) ("Proper purposes [for co-conspirators' guilty pleas] include disclosure of matters damaging to the credibility of a witness and contradiction of any inference that the government is concealing a witness' bias."); *see also* 2 J. Weinstein & M. Berger, *Evidence* ¶ 410[07], at n. 3 (1990) (If a co-offender who appears as a witness has pled guilty, "the trier must know about the plea's existence in order to evaluate the witness' testimony."). In this case, the defendants began their attack on the credibility of the government's witnesses in their opening statements to the jury. Yet even in the absence of this attack, the elicited testimony was proper here.

At the same time, it is important that the jury understand the limited purposes of a

co-conspirator's guilty plea. Here, in its final charge, the district court properly instructed the jury that the guilt of any one person was not substantive evidence of the guilt of any other person. We also note that the guilty pleas were not emphasized by the prosecutor during direct examination, and were not inappropriately emphasized during closing argument. We believe that the appropriate uses of the pleas were clear. The references to the pleas were not an abuse of discretion, let alone plain error.

B.

Defendants level a special attack on the testimony of Robert Reyers. He started the trial as a defendant but pled guilty on the twelfth of twenty-six days of trial and became a witness for the prosecution. During the government's case in chief, Reyers corroborated some of Kane's testimony through his own recollection of events, and also testified that Kane had told him about many of the incidents Kane mentioned at trial.

Defendants timely objected to Reyers' testimony on the grounds that it would impermissibly suggest the guilt of the remaining defendants. We review the district court's decision to admit Reyers' testimony for abuse of discretion. *See United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[7]

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7. Defendants raise two further objections to Reyers' testimony. First, they contend that the district court should have declared a mistrial even before the jury was apprised of Reyers' plea during his testimony, because the mere fact of his disappearance strongly implied his guilt, and in turn implicated the other defendants. Any such inference was foreclosed by the court's clear instruction to the jurors,

As we have noted, guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility, and to foreclose any suggestion that the party producing the witness was concealing evidence. That conclusion applies equally to Reyers' testimony. Reyers' relationships with the remaining defendants could have created the possibility for the prejudice that we warned of in *Bisaccia*. Here, the district court avoided those dangers. As we have noted, the district court properly instructed the jury on the appropriate uses of guilty pleas, and as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not emphasized by the prosecutor during direct examination, and was not inappropriately emphasized during closing argument. We believe that the appropriate uses of Reyers' plea were clear, and that the district court's decision to admit Reyers' testimony and to allow mention of his guilty plea was not an abuse of discretion.

This case is factually similar to *United States v. Kilrain*, 566 F.2d 979 (5th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). In that case, one of the defendants pled guilty in the middle of trial and became a government witness. The remaining defendants, who were convicted, contended that the defendant who pled guilty had been privy to their defense strategy, and therefore they were

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immediately after they entered the courtroom on the first day following Reyers' plea, that they were not to infer anything from Reyers' absence. At that point in the trial, we find no prejudice to the other defendants. Second, defendants contend that Reyers' testimony impermissibly bolstered Kane's credibility as a witness, because the jury might infer that Kane's testimony was one of the reasons Reyers pled guilty. We deal with this objection below.

deprived of a fair trial. The Court of Appeals for the Fifth Circuit upheld the convictions, observing that the remaining defendants needed to demonstrate some "actual prejudice resulting from [the witness'] supposed knowledge of defense strategy, or that [the witness] communicated such knowledge to the government." 566 F.2d at 983. In this case, defendants have not alleged any specific prejudice. Although the Sixth Amendment claim raised in *Kilrain* is different than the claim raised here, *Kilrain* lends support to our result today.

C.

Defendants also object to remarks made by the prosecution during closing arguments. Before discussing the challenged remarks, we must place them in context. A central focus of defendants' closing arguments – indeed much of their defense at trial – was Kane's lack of credibility. Counsel for Tony Mannino argued that "William Kane, as [the prosecution] knew before they put him on the stand, is a perjurer. Simple. He's got a history of it. . . . He told you he's a gangster, he's a wiseguy, he's a thug who goes around threatening people with a gun. . . . You decide: murderer or liar? Either way, his testimony isn't worth anything. William Kane is a cold, calculating individual who came here and lied even as we sat . . . ."

Even more telling, counsel for defendant Fodera, who was acquitted by the jury, pointedly made an issue of Reyers' lack of belief in Kane. In his closing argument, he remarked:

> This case is unique in the trials of criminal cases in that this is one of the rare instances that you

> will ever see where you will see one of the government witnesses get on the stand and say to you, as happened in this case, that another one is a liar and a perjurer. Do you remember Reyers, the fellow who used to sit in that corner over there, who pled guilty and became a government witness? Reyers testified in connection with this case, and Reyers, one of the things that he said is that Kane, when he testified in this court, lied. So, you have one witness characterizing another government witness as a perjurer.

The reference is to testimony by Reyers, elicited during cross-examination, recalling a conversation that Reyers had with Gambino's attorney before Reyers pled guilty. Reyers had told Gambino's attorney that he believed that Kane was lying on the stand. Later in his closing, counsel for Fodera again sounded this refrain:

> And Mr. Reyers, who was one of [the prosecution's] witnesses . . . said [Kane] lied on the witness stand and he was a liar, and I accuse [Kane] of being a murderer and I accuse him of being a perjurer, and I submit to you that it is not fair, it is not just, to try to convict [Fodera] solely on the testimony of a murderer, a perjurer, a robber, a burglar, a career criminal.

After these remarks, the prosecution, in its rebuttal remarks to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was

such a liar that, based on his evidence against them, they pled guilty. . . . You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Defendants timely objected to the prosecution's statements, and now contend that the reference to Reyers' and Cuffaro's guilty pleas deprived them of a fair trial. We review the district court's denial of a motion for a mistrial on these grounds for abuse of discretion. *See United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989). We will reverse if "the prosecutor's remarks, taken in context of the trial as a whole, were sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

Defendants raise two related arguments. First, they contend that the fact of Reyers' and Cuffaro's guilty pleas cannot appropriately be used to bolster Kane's credibility by suggesting that they, at least, believed Kane. Second, they argue that even if the prior guilty pleas are relevant, mentioning them warrants a mistrial because it suggests that the remaining defendants are guilty merely by virtue of their association with those who pled guilty.

At the outset, we note that the comments by the prosecutor were proper as a fair and invited response to the defendants' vehement attacks on Kane's credibility. "[P]rosecutorial comment must be examined in context." *United States v. Robinson*,

485 U.S. 25, 33 (1988). In *Robinson*, defendant's attorney had argued that the government had unfairly deprived his client, who did not testify at trial, of an opportunity to explain his actions. In his closing argument, the prosecutor commented that the defendant had the opportunity to take the stand and testify if he so desired. Defendant claimed that this reference deprived him of his right to be free from compulsory self-incrimination under the Fifth Amendment and under 18 U.S.C. § 3481 (1988). The Court rejected this claim, reasoning that the comments were a fair response to defendant's attacks. Similarly, in *United States v. Pungitore*, 910 F.2d 1084, 1120-27 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472), we held that a prosecutor's summation reference to his oath of office was a proper response to a closing argument attack on the integrity of the prosecution that ranged beyond any evidence adduced at trial. *See also United States v. Arnold*, 890 F.2d 825, 830 (6th Cir. 1989) (prosecutor's mention of codefendants' guilty pleas in closing argument appropriate rehabilitation of a witness' credibility); *United States ex rel. Paxos v. Rundle*, 491 F.2d 447, 453 (3d Cir. 1974) ("'counsel does have the right to reply to an argument raised by his opposing advocate'") (quoting *United States v. Casteel*, 476 F.2d 152, 155 (10th Cir. 1973)).

The reference to Reyers' guilty plea was appropriate as a direct response to a specific argument made by the defense. *See United States v. Sanchez*, 790 F.2d 1561 (11th Cir. 1986). In *Sanchez*, defendant was convicted of money laundering. He was involved in several transactions with an investment firm established by the DEA for the purpose of investigating the

laundering of drug proceeds. Defendant attacked, on cross-examination, one of the prosecution witness' "suitability for federal investigative work." 790 F.2d at 1564. The Court of Appeals for the Eleventh Circuit upheld the admission of testimony by a DEA agent that the witness had been found reliable in other investigations, because the testimony was a direct response to the defendant's attack. *See also* Fed. R. Evid. 608; McCormick, *Evidence* § 49 (3d ed. 1984).

We note that at least one other United States Court of Appeals has found guilty pleas relevant and admissible evidence of a witness' veracity when invoked as a direct response to a specific attack. In *United States v. Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985), much of the prosecution's case turned on the testimony of one witness, who like the defendant was an inmate in a state prison. The defendant pointed out that the witness had accused other inmates and guards of committing crimes, suggesting that the witness had fabricated these accusations to curry favor with the prison administration and to procure an early release. The prosecution rejoined with testimony establishing that all of the guards accused by the witness had pled guilty. The Court of Appeals for the Second Circuit approved, holding that admission of these other guilty pleas was not an abuse of discretion. *Id.* at 38. *Cf. United States v. Lochmondy*, 890 F.2d 817, 820-22 (6th Cir. 1989) (upholding a conviction when the government had, during closing, observed that one of the prosecution's witnesses had testified in other cases that resulted in convictions); *Arnold*, 890 F.2d at 830.

In this case, defendants made an issue of Reyers' belief in Kane in closing arguments. The

reference to Reyers' plea on rebuttal was an appropriate response. Defendants never specifically made an issue of Cuffaro's belief in Kane, so we find the reference to Cuffaro's plea more troubling. Even if we were to find that this was error, however, it would be harmless, because Cuffaro did not play a central role in either the conspiracy or the government's case at trial. In contrast, the issue of Kane's credibility was constantly revisited, by all parties, throughout the twenty-six day trial. Cuffaro's guilty plea was in an unrelated proceeding, and the role Kane's testimony played in that plea was, and remains, unclear. The one reference to Cuffaro's plea was not, when "taken in context of the trial as a whole, sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

It is significant that the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury. *Cf. United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) ("When bolstering testimony suggests to the jury that a witness bears the responsibility for determining the truth of the evidence, admission of the testimony may constitute reversible error.") (citing *United States v. Price*, 722 F.2d 88, 90 (5th Cir. 1983)); *United States v. Murray*, 445 F.2d 1171, 1176 n.7 (3d Cir. 1971); *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989) (prosecutorial vouching for the credibility of a witness improper).

Even if otherwise appropriate, the challenged references to guilty pleas could still constitute

reversible error if used as substantive evidence of the defendants' guilt. As we have noted, such use poses the threat that a defendant will be found guilty not on the basis of evidence against him, but on the basis of a shadow cast by cases against others. *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312-13 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). Therefore we must determine whether the appropriate use of the references was sufficiently clear.

As we have noted, there was a direct nexus between Reyers' plea and the attacks on Kane's credibility. This nexus made clear that the pleas were not offered as substantive evidence of the defendants' guilt. Cuffaro's plea, also, was mentioned in response to attacks on Kane's credibility. The connection to Kane's credibility was far less direct, and therefore the purpose less clear. As we have mentioned, however, he was not centrally involved in the conspiracy in this case. His guilty plea was entered in a different proceeding, and when he described his plea to the jury he mentioned only that he had purchased cocaine from Kane, and did not mention any of the defendants. Recalling this testimony in closing argument did not imply that any of the defendants were guilty of the offenses charged in this case. Finally, any possible misunderstanding of the appropriate use of the guilty pleas was cleared up by the district court's jury instructions. The court explicitly told the jury that the guilt of any person was not evidence of any other person's guilt. Defendants did not object to this charge. We view this as adequate, because under Fed. R. Crim. P. 30, "[i]f a more specific curative instruction were thought necessary, counsel should have requested

one before the jury retired." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988).

For these reasons, the prosecutor's remarks did not deprive defendants of a fair trial, and the district court's denial of defendants' motion for a mistrial on this ground was not an abuse of discretion.

IV.

Defendants raise several other grounds for appeal. First, they challenge the sufficiency of the evidence supporting their convictions and the forfeiture of the house. We have reviewed the record, and find those arguments without merit. *See Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Pungitore*, 910 F.2d 1084, 1128-29 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).

Defendants also claim that the district court improperly admitted Kane's hearsay testimony recounting matters about the conspiracy told him by Stefano Zito. Those statements were admitted under the co-conspirator exception we have already discussed. Defendants contend there was insufficient evidence establishing Stefano Zito's membership in the conspiracy; and that the statements were not in furtherance of the conspiracy. We disagree, and find those contentions without merit.

Defendants raise several other claims. They contend that: the district court's instructions to the jury were flawed; the prosecutors created or altered certain critical documents; the prosecutors improperly referred to charges pending against Simone Zito and Tony Mannino in Italy during trial; defendants were prejudiced by the handing

down of a superseding indictment six weeks prior to trial; the government failed adequately to minimize intercepted communications; the jury had available during its deliberations prejudicial tapes that had not been admitted into evidence; and the district court erroneously failed to quash a superseding indictment or order the government to provide a bill of particulars. We have considered each of these arguments and find them without merit.

For the foregoing reasons, we will affirm the judgments of sentence.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit